2-27-1976

Larry Wayne Keyes v. Commonwealth of Kentucky

Appellant's Brief 1976-SC-0012

APPELLANT'S BRIEF

550 SW 2d 192

SUPREME COURT OF KENTUCKY

FILE NO. 76-12

LARRY WAYNE KEYES — APPELLANT

VS. — APPEAL FROM CALDWELL CIRCUIT COURT
HON. THOMAS B. SPAIN, JUDGE

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLANT

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CERTIFICATE OF SERVICE:

I hereby certify that a copy of the foregoing Brief For Appellant has been mailed to the Hon. Thomas B. Spain, Judge, Caldwell Circuit Court, Caldwell County Courthouse, Princeton, Kentucky 42445; Hon. Albert W. Spenard, Commonwealth Attorney, 4th Judicial District, Princeton, Kentucky 42445; and Hon. Robert F. Stephens, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 23rd day of February, 1976.

Larry H. Marshall

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* * * * * * * * * * *

MAY IT PLEASE THE COURT:

STATEMENT OF THE QUESTIONS PRESENTED

I.

WAS THE EVIDENCE OF RECORD INSUFFICIENT IN LAW AND FACT TO SUSTAIN A VERDICT OF GUILTY OF STOREHOUSE BREAKING SINCE ENTRAPMENT WAS A COMPLETE DEFENSE TO THIS PROSECUTION?

II.

DID THE COURT BELOW ERR TO APPELLANT'S SUBSTANTIAL PREJUDICE BY ALLOWING THE PROSECUTOR TO INTRODUCE, DURING CLOSING ARGUMENT, THE FACT THAT APPELLANT STOOD MUTE AND FAILED TO OFFER EXCULPATORY EVIDENCE AFTER BEING ARRESTED?

STATEMENT OF THE CASE

On February 5, 1975, Appellant and Roy Puckett were jointly indicted in the Caldwell Circuit Court for the offense of storehouse breaking in violation of KRS 433.190 (Transcript of Record, hereinafter T.R., pp. 1-2). Although jointly indicted with Puckett, Appellant was jointly tried with Donald Murray on June 5 and 6, 1975 (T.R., pp. 32-33).

Contrary to his plea, Appellant was convicted and sentenced to one year's confinement on June 9, 1975 (T.R., p. 34). Judgment was entered on June 18, 1975 (T.R., p. 43). On June 23, 1975, Appellant filed his Notice of Appeal (T.R., p. 44).

ARGUMENTS

I.

THE EVIDENCE OF RECORD WAS INSUFFICIENT IN LAW AND FACT TO SUSTAIN A VERDICT OF GUILTY OF STOREHOUSE BREAKING SINCE ENTRAPMENT WAS A COMPLETE DEFENSE TO THIS PROSECUTION.

Appellant testified in his own behalf and admitted that he broke into Robinson's Implement Company along with Roy Puckett and Billy Lamb (Transcript of Evidence, hereinafter T.E., Vol. III, p. 307). However, in exculpation Appellant offered the defense of entrapment.

Appellant testified that on Monday, November 4, 1974, at Appellant's sister's house (T.E., Vol. III, p. 309), Billy Lamb first brought up the subject of breaking into Robinson's Implement Company (T.E., Vol. III, p. 308). Present at this discussion were Appellant, Donald Murray (Appellant's codefendant), Roy Puckett, and Billy Lamb (T.E., Vol. III, p. 309). When Appellant decided not to break in, Billy Lamb got upset and "mad", and Lamb kept "bugging" them about breaking into the implement company (Id.). At that point, Lamb suggested that they should

drive by the implement company so Lamb could show them how easy it would be to break into the place (T.E., Vol. III, p. 310). To appease Lamb, the three drove by the company; but again Appellant, Murray and Puckett agreed not to do it, and the four then went back to Appellant's sister's house (Id.). Nevertheless, Lamb persisted in his attempt to get the other three to commit a felony to the point of trying to talk a thirteen year old kid into engaging in this criminal conduct (Id.) When Lamb recognized that his efforts had proved futile, Lamb asked Murray to take him home.

However, the next morning, according to Appellant, Lamb was again promoting the idea of breaking into the implement company. Appellant testified that Lamb met Appellant and Puckett at City Court (T.E., Vol. III, p. 312), and Appellant testified that Lamb told Puckett that the safe in the implement company had a lot of money in it (Id.). At this point, Appellant and Puckett tried to give Lamb the run-around by telling Lamb they would be at a certain place at a certain time; however, they would not show up at these places (T.E., Vol. III, pp. 312-313). But Lamb kept trying to find them, and he succeeded in locating Appellant, Puckett and codefendant Murray at Appellant's sister's house (T.E., Vol. III, p. 313).

When Lamb arrived at Sharon Keyes' house, Puckett was sleeping, yet this did not keep Lamb from awaking Puckett (Id.). Again Lamb brought up the implement company break-in (T.E., Vol. III, p. 314), and to humor Lamb, they finally agreed to ride out to the implement company (Id.). But once there, Lamb knocked out the window (Id.), and Appellant and Puckett entered the building (Id.). Appellant further testified that they were in the building between ten and twenty minutes (T.E., Vol. III, p. 315),

when they heard somebody walking and decided to leave (Id.). However, the "somebody" turned out to be the police, and Appellant, codefendant Murray and Puckett were arrested (T.E., Vol. III, pp. 307-308), but Lamb was not arrested (T.E., Vol. III, p. 308).

The above-cited testimony that Billy Lamb planned and encouraged the breaking into of the implement company was also corroborated by the testimony of codefendant Murray (T.E., Vol. II, pp. 241-245), and Sharon Keyes (T.E., Vol. III, p. 332).

To sustain the defense of entrapment, the defendant must establish that the government through its agents encouraged, induced, or persuaded the defendant to commit a criminal act which he would not otherwise have done. Dumon v. Commonwealth, Ky., 488 S.W.2d 343, 344 (1972); KRS 505.010(1).

In other words:

> . . .When the criminal design originates, not with the accused, but is conceived in the mind of the government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution therefor. . . .Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 214, 77 L.Ed. 413 (1932).

See also Sherman v. United States, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958); Scott v. Commonwealth, 303 Ky. 353, 197 S.W. 2d 774 (1946).

In the case at bar, the record clearly showed that Appellant was not the type of individual who regularly engaged in criminal conduct. Rather the record reflected the anxiety and persistence on the part of Billy Lamb to get Appellant to engage in proscribed conduct. The "criminal intent" originated in Billy Lamb, who was working for Sheriff Billy Hudson.

It must be admitted that Sheriff Hudson testified that he did not empower anyone as his agent to encourage the breaking into of the implement company (T.E., Vol. II, p. 181). Sheriff Hudson also testified that he never paid Lamb any money to encourage the commission of crimes (T.E., Vol. II, p. 172).

Also to no one's surprise, Billy Lamb testified that he was not present at Robinson's Implement Company when the break-in occurred (T.E., Vol. III, p. 324); that he did not discuss breaking into the implement company with Appellant (T.E., Vol. III, p. 329); that he never served as informant for the Sheriff (Id.).

However, the protestations of Sheriff Hudson and Billy Lamb, that Lamb was not an agent and did not encourage the implement company break-in, can not withstand the numerous suspicious circumstantial evidence that permeates this entire record. This circumstantial evidence showed that Billy Lamb was released from jail, under mysterious circumstances, a couple of weeks before the break-in occurred, only after having served fifteen days of a ninety day sentence (T.E., Vol. III, p. 327); that Sheriff Hudson "loaned" Billy Lamb $100.00 after the indictments were returned against the defendants (T.E., Vol. II, p. 182), and the money has not been repaid (T.E., Vol. II, p. 183); that Sheriff Hudson on the basis of two 'anonymous phone calls went to a lot of trouble, on successive nights, at setting up stake-outs at the implement company (T.E., Vol. II, pp. 176-177); that Sheriff Hudson waited to the last minute on the night of each stake-out to inform the other officers that there was going to be a stake-out (T.E., Vol. II, pp. 191, 201, 209); that prior to calling Monday's stake-out off, Sheriff Hudson went to town to see if the defendants were still on the streets (T.E.,Vol. II, p. 165); that after capturing Appellant, Murray and Puckett with the elaborate stake-out, Sheriff Hudson conveniently allowed

the fourth suspect to escape (T.E., Vol. II, p. 157).

The case sub judice is an obvious example of an entrapment case. The plan to break into the implement company was clearly the "product of the creative activity" of Sheriff Hudson. It had no purpose other than instituting a criminal prosecution against Appellant.

Sheriff Hudson, an elected official, had been beseiged with other unsolved break-ins, and he was probably worried about his political future. Therefore, to counter his newly acquired image of being just another "dumb" sheriff, Sheriff Hudson commissioned this break-in in order to obtain a conviction. That this was the case is very evident from Sheriff Hudson's testimony given before the grand jury:

> . . .I made them [the defendants] a little talk while we was there because there had been some places broke into here in town where they left some notes about how dumb I was, what a dumb SOB I was and so forth and I told the boys out there that--which I think maybe they might have done that too--anyway, I told them out there that the dumb sheriff was there but the dog wasn't. They mentioned a dog out here on Coleman and Dunn's break in. . . .(T.R., pp. 24-25).

The case at bar is a classic example of a public official encouraging prohibitive conduct in order to obtain evidence against a person for the purpose of criminal prosecution. Because the crime was manufactured by Sheriff Hudson, Appellant's conviction can not be allowed to stand.

This error was clearly preserved for appellate review by Appellant's counsel's motions for directed verdict (T.E., Vol. II, p. 230; Vol. III, p. 333).

Since Appellant was not otherwise disposed to commit this break-in, but rather was induced and encouraged to engage in the proscribed conduct by Billy Lamb, who was acting in concert with Sheriff Hudson, this Court must now reverse Appellant's conviction since entrapment was a defense to this prosecution.

II.

THE COURT BELOW ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY ALLOWING THE PROSECUTOR TO INTRODUCE, DURING CLOSING ARGUMENT, THE FACT THAT APPELLANT STOOD MUTE AND FAILED TO OFFER EXCULPATORY EVIDENCE AFTER BEING ARRESTED.

Appellant did not deny breaking into Robinson's Implement Company (T.E., Vol. III, p. 307). However, he asserted throughout the trial that he was encouraged or induced to participate in the storehouse breaking by Billy Lamb, who was acting in cooperation with Sheriff Hudson. In other words, Appellant relied on the defense of entrapment.

Since the court below instructed the jury on Appellant's theory of the case (T.E., Vol. III, p. 340), the Commonwealth Attorney presumably felt it was incumbent to discredit this defense. Therefore, during his closing argument, the prosecutor stated:

> . . .Really, the only evidence that you have -- The only evidence that you have -- to the fact there was any encouragement on the part of Billy Lamb is their testimony, Don Murray and Larry Keys and one statement by Sharon Keys, sister of Larry Wayne Keys. That is the only testimony. Maybe they induced Billy Lamb, if he was the one. Maybe they induced him into going down there or whoever it was. I don't know whether or not it was Billy Lamb. <u>They didn't know after it happened -- You will remember after they were caught, that is the first thing that they asked them.</u> They said, "Who was he? Who was the other one?" They knew a third subject had gone into the building. <u>They said, "I don't know". They didn't know then and they know now.</u> The defense would elude in an argument, "Why isn't the other person prosecuted?" I will say to you one thing, "What in the world are you going to prosecute on?" They said they don't know who it was. None of the police officers testified that they knew who it was. So, how do you prosecute on that. In Court Friday, or whenever it was, they say it was "Billy Lamb". . . .(T.E., Vol. III, pp. 376-377). [My emphasis added].

The length to which the prosecutor was willing to go in order to prejudice the defendants in the eyes of the jury, and to discredit the entrapment defense can be seen in the cross-examination of codefendant Murray:

> Q Did you tell the Sheriff or any of the other law enforcement officers that night or anytime thereafter who the fourth subject had been?
>
> A No, sir.
>
> Q Did anybody?
>
> A Not that I know of.
>
> Q In fact, didn't you and the others deny there was a fourth subject?
>
> A At the time?
>
> Q At the time?
>
> A Yes (T.E., Vol. II, p. 240).

The Supreme Court in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), unequivocably stated:

> In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he [the defendant] stood mute or claimed his privilege in the face of accusation. . . .Id., 86 S.Ct. at 1625, N. 37. [My emphasis added].

In its latest pronouncement, the Supreme Court held in United States v. Hale, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975), that it was reversible error for the prosecution to cross-examine the defendant as to his failure to offer exculpatory evidence shortly after his arrest. In the cited case, the Supreme Court stated:

> At the time of arrest and during custodial interrogation, innocent and guilty alike-perhaps particularly the innocent-may find the situation so intimidating that they may choose to stand mute. A variety of reasons may influence that decision. In these often emotional and confusing circumstances, a suspect may not have heard or fully understood the question or may have felt there was no need to reply. . .He may have maintained silence out of fear or unwillingness to incriminate another. Or the arrestee may simply react with silence in response to the hostile and perhaps unfamiliar atmosphere surrounding his detention. In sum, the inherent pressures of in-custody interrogation exceed those of questioning before a grand jury and compound the difficulty of identifying the reason for silence. Id., 95 S.Ct. at 2137.

However, a more important reason to exclude evidence that the defendant stood mute at the time of arrest is the danger:

> . . . that the jury is likely to assign much more weight to defendant's previous silence than is warranted. And permitting the defendant to explain the reasons for his silence is unlikely to overcome the strong negative inferences that the jury is likely to draw from the fact that the defendant remained silent at the time of his arrest. Id., 95 S.Ct. at 2138.

In the case at bar, Appellant was advised of his rights at the time of his arrest (T.R., p. 21); however, he offered no exculpatory information to the officers. Although Appellant's silence could have been due to his belief that it would be conducive to his welfare to remain silent, Cessna v. Commonwealth, Ky., 465 S.W.2d 283, 285 (1971), it appears that the jury viewed Appellant's silence as an"inference that the explanatory testimony was a later fabrication." Hale, supra, 95 S.Ct. at 2137.

Appellant submits that any comment on his failure to offer exculpatory evidence at the time of his arrest is "error of constitutional magnitude" which in and of itself will void

his conviction. See Minor v. Black, _____F.2d_____(6th Cir. No. 74-2242, Decided December 8, 1975); United States v. Brinson, 411 F.2d 1057 (6th Cir. 1969); People v. Wright, 336 N.E.2d 18 (Ill. 1975).

However, this Court in Niemeyer, et al v. Commonwealth, Ky., _____S.W.2d _____(Rendered February 6, 1976), has taken a rather restrictive approach. Before such an error will be held reversible, the appellate court must consider whether upon the whole case there is a substantial possibility that the result would have been any different. In making this determination, the appellate court must consider "the weight of the evidence and the degree of the punishment fixed by the verdict." Id., at Master Slip Opinion, p. 8.

But even under these guidelines, Appellant can show that the comment on his silence at arrest was prejudicial. Although the only evidence offered in support of the entrapment defense was the defendant's testimony, other circumstantial evidence strongly indicated that Billy Lamb was an agent for Sheriff Hudson [see Argument I].

Also the penalty imposed by the jury was the minimum sentence for the offense of storehouse breaking. KRS 433.190. This was clearly a manifestation of prejudice because it conclusively showed that this was not a clear case at all, rather the comment on Appellant's failure to offer exculpatory evidence at arrest seemed to have tipped the balance in favor of conviction. Therefore, it can not be said, beyond a reasonable doubt, that this error "did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 828, 17 L.Ed. 2d 705 (1967).

It must be admitted that Appellant's trial counsel did not object to the undeniably improper and prejudicial

closing argument of the prosecutor set out above. However, this Court should still review this error and grant appropriate relief.

In Stone v. Commonwealth, Ky., 456 S.W.2d 43 (1970), this Court acknowledged that an appellate court, if it believed that there may be a miscarriage of justice, should exercise its extraordinary power and reverse the judgment below even though the specific error was never presented to the trial court. Further, this is an "error of constitutional magnitude" which should not preclude this Court from granting relief even though the error was not preserved. Minor, supra.

Since this constitutional error is of such magnitude that it denied Appellant due process of law, this Court must reverse Appellant's conviction and grant him a new trial.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the judgment of the lower court be reversed.

Respectfully submitted,

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